



DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 215 and 242

[Docket DARS-2021-0015]

RIN 0750-AK95

Defense Federal Acquisition Regulation Supplement: Requiring Data Other than Certified Cost or Pricing Data (DFARS Case 2020-D008)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2020 that provides additional requirements relating to the submission of data other than cost or pricing data.

DATES: Effective [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

FOR FURTHER INFORMATION CONTACT: David E. Johnson, telephone 202-913-5764.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the **Federal Register** at 86 FR 48368 on August 30, 2021, to implement section 803 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY)

2020 (Pub. L. 116-92). Section 803 amends 10 U.S.C. 2306a(d) (redesignated as 10 U.S.C. 3705) to prohibit contracting officers from determining that the price of a contract or subcontract is fair and reasonable based solely on historical prices paid by the Government and to state that an offeror is ineligible for award if the contracting officer is unable to determine proposed prices are fair and reasonable by any other means, when an offeror fails to make a good faith effort to comply with a reasonable request to submit data other than certified cost or pricing data, unless the head of the contracting activity (HCA) determines that it is in the best interest of the Government to make the award to that offeror. Five respondents submitted public comments in response to the proposed rule.

II. Discussion and Analysis

DoD reviewed the public comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments is provided, as follows:

A. Summary of Significant Changes from the Proposed Rule

DoD revised DFARS 215.403-3(a)(1) to include the word "subcontract" to clarify that, in accordance with section 803 of the NDAA for FY 2020, the rule applies to subcontractors. One respondent suggested this revision.

DoD revised DFARS 215.403-3(a)(4) to include, in accordance with section 803 of the NDAA for FY 2020, the requirement that

offerors make a good faith effort to comply with the Government's reasonable requests to furnish data other than certified cost or pricing data. Two respondents suggested this revision.

B. Analysis of Public Comments

1. Clarification of the requirement not to base price-reasonableness solely on historical prices paid by the Government

Comment: Three respondents expressed confusion with the requirement not to base price reasonableness solely on historical prices paid by the Government. Multiple respondents requested clarification on the restriction of use of previously performed cost and price analysis. Another respondent expressed concern with inclusion of the requirement in multiple sections and recommended that the requirement should be clearly connected to other relevant factors such as time elapsed since prior purchase, and any differences in quantities purchased as part of the price reasonableness determination.

Response: The rule does not prohibit contracting officers from utilizing prior cost or price analyses, nor does it absolutely prohibit contracting officers from utilizing historical prices paid by the Government to determine prices fair and reasonable. Rather, the rule prohibits contracting officers from determining the price of a contract to be fair and reasonable based solely on historical prices paid by the Government. Under this rule, historical prices paid by the

Government cannot properly comprise the only factor when determining prices fair and reasonable, but rather may be used as one factor among several. Inclusion of the requirement in DFARS 215.403-3 was intentional to ensure the contracting officer is aware of the requirement in the event that prior prices paid by the Government are the only information available, and other than certified cost or pricing data will likely have to be obtained. The respondents' recommendation to clearly connect the requirement to other relevant factors was not incorporated as it already exists in DFARS 215.404-1(b)(ii). Accordingly, no changes to the rule are necessary as a result of these comments.

2. Application of the rule to subcontracts and flowdown requirements

Comment: Four respondents questioned whether the requirement flowed down to subcontracts. One respondent questioned whether or not the contractor would need to develop a package for the contracting officer to submit to the HCA for a determination that the purchase is in the best interest of the Government, or if the determination that the purchase is in the best interest of the Government could be made by an official of the contractor. Another respondent inquired whether contracting officers would be required to provide previous prices paid to contractors, and if there would be a requirement that contractors be prohibited from making a price reasonableness determination based solely on historical prices paid by the

contractor. Further, another respondent questioned whether the contractors would be required to track information about subcontractors providing cost data, similar to the Contractor Performance Assessment Reporting System (CPARS).

Response: The rule does apply to subcontracts, and DoD concurs with adding the word "subcontract" to 215.403-3(a)(4) to reflect the statutory language at section 803 of the NDAA for FY 2020. The contractor would not need to develop a package for the contracting officer to submit to the HCA. The HCA would be making that decision based upon the inputs from the Government team, whether it was at the prime or subcontract level, and any inputs from the contractor would be limited to providing supporting data to the contracting officer. The Government would not be able to disclose price information unless the contractors involved agreed to the release of the data. The contracting officer would be responsible to assess and evaluate the analysis performed by the prime on their subcontractors to ensure they considered additional data aside from the previous prices paid. Contractors will not be required to track information about subcontractors providing cost data similar to CPARS. The contracting officer would be responsible for tracking this information for prime contractors and subcontractors.

3. Further changes to effect the intent of the rule

Comment: One respondent recommended augmenting DFARS 252.215-7010 with additional requirements intended to maximize

cooperation from offerors when contracting officers make data requests.

Response: The respondent's recommendation is outside the scope of this rule.

4. Further changes to maximize consistency

Comment: One respondent recommended amending DFARS 215.404-1(b)(v)(C) to change the term "customer," to "type of customer."

Response: DoD does not concur with this recommendation because it is not required to implement the statute.

5. Inclusion of the requirement for "good faith" efforts to comply with a reasonable request to furnish data other than certified cost or pricing data

Comment: Two respondents recommended revising the final rule at DFARS 215.403-3(a)(4), to include, in accordance with section 803 of the NDAA for FY 2020, the requirement that offerors make good faith efforts when complying with the Government's reasonable requests to furnish data other than certified cost or pricing data.

Response: DoD concurs with this recommendation and has revised DFARS 215.403-3(a)(4) to include "make a good faith effort to comply with a reasonable request".

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Services or Commercial Products, Including Commercially Available Off-the-Shelf (COTS) Items

This rule does not create any new solicitation provisions or contract clauses. It does not impact any existing solicitation provisions or contract clauses or their applicability to contracts valued at or below the SAT, for commercial services, or for commercial products including COTS items.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

V. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801-808) before an interim or final rule takes effect, DoD will submit a copy of the interim or final rule with the form, Submission of Federal Rules under the Congressional Review Act, to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the Congressional Review Act cannot take effect until 60 days after

it is published in the **Federal Register**. The Office of Information and Regulatory Affairs has determined that this rule is not a major rule as defined by 5 U.S.C. 804.

VI. Regulatory Flexibility Act

A final regulatory flexibility analysis has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, and is summarized as follows:

The objective of this rule is to implement section 803 of the National Defense Authorization Act for Fiscal Year 2020. Section 803 provides additional requirements for contracting officers and the head of the contracting activity relating to obtaining data other than certified cost or pricing data.

DoD received no public comments in response to the initial regulatory flexibility analysis.

This rule does not directly impose requirements on small entities. The section 803 requirement making certain offerors ineligible for award is already in the Federal Acquisition Regulation. This rule impacts (1) the contracting officer's need for data other than historical prices paid by the Government, unless there is adequate price competition; and (2) the criteria for the head of the contracting activity's determination to make an award. In some cases, the contracting officer's need for data other than historical prices paid by the Government may result in a request for additional data from an offeror. Based on data from the Federal Procurement Data System

for FY 2018 through FY 2020, DoD estimates that 1,672 small entities may receive a request for additional data.

This rule entails no new reporting, recordkeeping, or other compliance requirements on small entities. There are no known alternative approaches to the rule that would meet the stated objectives of the statute.

VII. Paperwork Reduction Act

This rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 215 and 242

Government procurement.

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 215 and 242 are amended as follows:

1. The authority citation for parts 215 and 242 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 215—CONTRACTING BY NEGOTIATION

2. Amend section 215.403-3 by adding paragraph (a) to read as follows:

215.403-3 Requiring data other than certified cost or pricing data.

* * * * *

(a) In accordance with 10 U.S.C. 2306a(d)—

(1) Contracting officers shall not determine the price of a contract or subcontract to be fair and reasonable based solely on historical prices paid by the Government (see PGI 215.403-3(4)); and

(4) In lieu of the factors for consideration listed in FAR 15.403-3(a)(4), a determination by the head of the contracting activity (see PGI 215.403-3(7)) that it is in the best interest of the Government to make the award to an offeror that does not make a good faith effort to comply with a reasonable request to submit data other than certified cost or pricing data shall be based on consideration of pertinent factors, including the following:

(i) The effort to obtain the data.

(ii) Availability of other sources of supply of the item or service.

(iii) The urgency or criticality of the Government's need for the item or service.

(iv) Reasonableness of the price of the contract, subcontract, or modification of the contract or subcontract based on information available to the contracting officer.

(v) Rationale or justification made by the offeror for not providing the requested data.

(vi) Risk to the Government if award is not made.

* * * * *

3. Amend section 215.404-1 by revising paragraph (b)(ii) and paragraph (b)(v) introductory text to read as follows:

215.404-1 Proposal analysis techniques.

* * * * *

(b) * * *

(ii) If the contracting officer determines that the information obtained through market research is insufficient to determine the reasonableness of price, the contracting officer shall consider information submitted by the offeror of recent purchase prices paid by the Government and commercial customers for the same or similar commercial items under comparable terms and conditions in establishing price reasonableness on a subsequent purchase if the contracting officer is satisfied that the prices previously paid remain a valid reference for comparison. Price reasonableness shall not be based solely on historical prices paid by the Government (see 215.403-3(a)(1)). The contracting officer shall consider the totality of other relevant factors such as the time elapsed since the prior purchase and any differences in the quantities purchased (10 U.S.C. 2306a(b)(5)).

* * * * *

(v) When evaluating pricing data, the contracting officer shall consider materially differing terms and conditions, quantities, and market and economic factors (see PGI 215.404-1(b)(v)). For similar items, the contracting officer shall also consider material differences between the similar item and the item being procured (see FAR 15.404-1(b)(2)(ii)(B)). Material differences are those that could reasonably be expected to influence the contracting officer's determination of price

reasonableness. The contracting officer shall consider the following factors when evaluating the relevance of the information available:

* * * * *

PART 242—CONTRACT ADMINISTRATION AND AUDIT SERVICES

4. Revise section 242.1502 to read as follows:

242.1502 Policy.

(g) Past performance evaluations in the Contractor Performance Assessment Reporting System—

(i) Shall include an assessment of the contractor's performance against, and efforts to achieve, the goals identified in its comprehensive small business subcontracting plan when the contract contains the clause at 252.219-7004, Small Business Subcontracting Plan (Test Program); and

(ii) Shall, unless exempted by the head of the contracting activity, include a notation on contractors that have denied multiple requests for submission of data other than certified cost or pricing data over the preceding 3-year period, but nevertheless received an award (10 U.S.C. 2306a(d) (2) (B) (ii)).